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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

RICHARD A. SCHMIDT, M.D.,
Petitioner,

v.

OTTAWA MEDICAL CENTER, P.C., A CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the petitioner is an employee of a professional corporation under the terms of a written employment agreement, and he is also a shareholder and member of the board of directors, where the corporation has non-shareholder employees exceeding the twenty employee subject matter jurisdiction threshold, is the petitioner an "employee" entitled to bring suit under the ADEA under the guidelines set forth in *Clackamas Gastroenterology associates, P .C. v. Wells.*

TABLE OF CONTENTS

Page No.

Title Page

Question Presented for Review i

Table of Contents ii

Table of Cases and Citations iii

Table of Appendices v

Petition for Writ of Certiorari 1

Citations of Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions 2

Statement of the Case 5

Reason For Granting Writ 10

Conclusion 24

TABLE OF CITED AUTHORITIES

Age Discrimination in Employment Act (ADEA),
29 U.S.C. § 621 et seq. 1, 3, 5, 6, 7, 8, 9 10, 11

Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977). 6, 8

Caruso vs. Peat, Marwick, Mitchell & Co.,
779 F. Supp. 332, (S.D.N.Y. 1991) 10

Clackamas Gastroenterology Associates, P.C v. Wells
01-1435, (U.S. 2003) (slip opinion) 6, 7, 9, 10, 11

EEC v. Peat, Marwick Mitchell & Co.
775 F.2d 928 (8th Cir., 1985) 10

EEC v. First Catholic Slovak Ladies Association,
694 F.2d 1068, 1070 (6th Cir., 1982) 10

EEC v. Johnson & Higgins,
91 F.3d 1529 (6th Cir., 1996). 10

E.E.O.C. v. Dowd & Dowd, Ltd.,
736 F.2d 1177 (7th Cir. 1984). 6, 8, 9

Gorman v. North Pittsburgh Oral Surgery Associates,
664 F.Supp. 212 (W.D.Pa.1987) 10

Hishon v. King & Spaulding,
467 U.S. 69, 104 S.Ct. 2229 (1984) 16

Hyland v. New Haven Radiology Associates,
794 F.2d 793 (2nd Cir. 1986). 10

Johnson v. Cooper, Deans & Cargill,
884 F.Supp. 43 (D.N.H., 1994) 10

Jones vs. Baskin, Flaherts, Elliot and Mannino, P.C.,
670 F.Supp. 597 (W.D.Pa.1987) 10

Mooney vs. Bayfield Construction Co.,
1995 WL 530656 (N.D., Ill.). 10

Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996).9,10

Smith v. Deitsch and Royer MD, Inc., 2000 U.S. Dist. LEXIS
16657 (Aug. 23, 2000) 9

TABLE OF APPENDICES

Page No.

Appendix A – Opinion of the United States Court 1a
of Appeals for the Seventh Circuit Dated and Decided
March 5, 2003

Appendix B – Opinion of the United States 15b
District Court for the Northern District of Illinois Dated and
Decided August 3, 2001

PETITION FOR WRIT OF CERTIORARI
CITATIONS OF OPINIONS BELOW

The District Court's opinion (per BUCKLO. D.J.) Granting Respondent's summary judgment motion (Appendix B) may be found at *SCHMIDT v. OTTAWA MEDICAL CENTER, P.C.*, (N.D.Ill. 2001) No. 00 C 7973 August 3, 2001. The Court of Appeals' opinion (per KANNE, C.J. joined by WOOD and EVANS is published at *SCHMIDT v. OTTAWA MED. CTR.*, 322 F.3d 461 (7th Cir. 2003)

STATEMENT OF JURISDICTION

The Circuit Court of Appeals opinion was issued March 5, 2003. United States Supreme Court Jurisdiction is under 28 U.S.C. Sections 1254 which provides that: Courts of appeals; certiorari; certified questions Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §623.

"It shall be unlawful for an employer- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or "It shall be unlawful for an employer- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter."

29 U.S.C. Section 630

Definitions For the purposes of this chapter —

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the

United States employed by an employer in a workplace in a foreign country.

STATEMENT OF THE CASE

The plaintiff, Richard A. Schmidt, M.D., brought suit pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. The plaintiff alleged that Ottawa Medical Center had compensated younger and less experienced physicians at higher wages than his own, that Ottawa Medical Center discriminated against him by adhering to an on-call schedule that was difficult for him to meet due to his age, and by refusing to fully fund his profit sharing and retirement programs, to the plaintiff's detriment.

The Defendant Ottawa Medical Center moved for summary judgment, asserting that under the ADEA, this plaintiff was not an employee entitled to protection. The Defendant, although conceding that it had more than enough employees to meet the 20 employee statutory subject matter jurisdictional threshold, asserted, that as matter of law, Dr. Schmidt's status as a shareholder in a professional corporation prohibited him from claiming status as an "employee" within the meaning of the ADEA. On 3rd day of August, 2001 the Honorable Judge Elaine Bucklo granted Defendant's Motion for Summary Judgment. Plaintiff filed his Notice of Appeal. On March 5, 2003 the Circuit Court of Appeals affirmed the District's Court's order. 322 F.3d 461 (7th Cir., 2003).

Plaintiff, Richard A. Schmidt, M.D. is a licensed physician who practiced medicine in Ottawa, Illinois. He was a founding shareholder of the Defendant Ottawa Medical Center, which was incorporated as a professional corporation in 1969. Dr. Schmidt had been a shareholder of O.M.C. since its incorporation and he remained a shareholder of the corporation at the time of the hearing on the Motion for Summary Judgment. Ottawa Medical Center employed in

total, 76 employees, consisting of eight physicians who are also shareholders (including Dr. Schmidt), three physicians that are not shareholders, one nurse practitioner, who is not a shareholder, and 65 other employees, none of whom are shareholders.

Dr. Schmidt was employed by Ottawa Medical Center as a licensed physician-employee practicing medicine, pursuant to a employment agreement first entered into between Ottawa Medical Center and Dr. Schmidt on December 1, 1976 and amended June 23, 1983. The contract provided in pertinent part that Dr. Schmidt shall be employed as a physician and surgeon by the corporation, and shall devote all of his professional time, knowledge and skill to his employment and shall perform such duties and occupy such positions and offices as the board of directors of the corporation may from time to time determine, including without limitation those duties and obligation set forth in the agreement as well as the treatment and diagnosis of those patients assigned to him by the corporation. Additionally the contract provided that all proceeds received by the employee for professional services, for whatever source derived, shall be the property of the corporation. Although Dr. Schmidt had been given, pursuant to the agreement, complete control over the diagnosis and treatment of patients assigned to him, the corporation's board of directors retained the right to relieve him from the treatment of any patient the board of directors felt would be better treated by another employee of the corporation. The employment agreement further provided that the board of directors would have the sole authority to determine what employees of the corporation shall perform medical services for any particular patient. For compensation the contract provided that for all services rendered by the employee under the agreement the corporation would pay Dr. Schmidt a basic salary of $3700.00 per month. Additionally, Dr. Schmidt was eligible under the terms of the employment agreement to receive additional

compensation in such forms and amounts as the corporation deemed appropriate. The employment contract remained in effect at the time of the hearing on the Motion for Summary Judgment, having never been terminated by Dr. Schmidt or Ottawa Medical Center and the corporation had provided additional compensation pursuant to compensation plans which have been adopted and revised from time to time by the corporation. Dr. Schmidt was paid solely his basic salary of $3700.00 per month.

On or about December 15, 1999, Dr. Schmidt filed charges alleging age discrimination against Ottawa Medical Center pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., simultaneously with the Illinois Human Rights Commission ("ADHERE") and the Equal Employment Opportunity Commission ("EEC"). On or about August 3, 2000 pursuant to ADHERE's Rules and Regulations, the EEC dismissed the case and issued the plaintiff a Notice of his Right to Sue in federal court. The Defendant Ottawa Medical Center filed a Motion for Summary Judgment contending that Dr. Schmidt was not an employee of Ottawa Medical Center for the purposes of the Americans with Disabilities in Employment Act and was therefore not entitled to bring suit. The District Court, on August 3, 2001, granted Defendant's motion and Plaintiff timely filed his Notice of Appeal to the Circuit Court of Appeals for the Seventh Circuit. On March 5, 2003 the Circuit Court of Appeals affirmed the District Courts ruling, holding that when an individual claimant-shareholder enjoys the opportunity for shared control of a closely held professional corporation, including the opportunity to share in its profits, the Court will treat him or her as a bone-fide employer for purposes of the ADEA.

REASON FOR GRANTING THE WRIT

Plaintiff seeks review of the Circuit Court of Appeal's decision to affirm the District Court's grant of Defendant's Motion for Summary Judgment. Plaintiff argues that *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984), and *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) relied upon by Circuit Court and the District Court for the proposition that Plaintiff's status as a shareholder in a professional medical corporation prevents him from being considered an employee entitled to bring suit under the ADEA conflicts with this Court's ruling in *Clackamas V. Gastroenterology Associates V. Wells*, 01-1435, (U.S. 2003) (slip opinion).

In the instant case, although Plaintiff was a shareholder of the corporation and he had been one of its managing shareholder physicians; that is not the sole capacity in which he was employed by the corporation. In addition to compensation plan adopted by corporate board of directors for shareholders, he was also compensated pursuant to an employment contract designed for the firm's physician-employees dating back to 1976, which provided that Plaintiff shall be employed as a physician and surgeon by the corporation, and shall devote all of his professional time, knowledge and skill to his employment and shall perform such duties and occupy such positions and offices as the board of directors of the corporation may from time to time determine, including without limitation those duties and obligation set forth in the agreement as well as the treatment and diagnosis of those patients assigned to him by the corporation. Under the employment agreement he was entitled to and did receive compensation for the medical services rendered as an employee, separate and apart from his duties as a shareholder, and member of the board of directors. That employment contract remained in effect, having never been

terminated by Dr. Schmidt or Ottawa Medical Center. The corporation has from time to time provided additional compensation for shareholders pursuant to compensation plans adopted by the Board of Directors.

Based on the fact based tests adopted by the United States Supreme Court in *Clackamas Gastroenterology Associates, P.C v. Wells* 01-1435, (U.S. 2003) (slip opinion), to determine whether a person should be treated as a covered employee under the ADEA,, Plaintiff believes that his capacity with the corporation was in reality also that of an employee, and as such was entitled to bring suit under the ADEA.. Plaintiff argued to the Circuit Court of Appeals that the determination of whether an individual was an employee and therefore covered by the protections of the ADEA should not center on the label which the organization has chosen to give to the position but should look to the particular circumstances of the case at hand and focus not on any label, but only actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership or as an employee.

Section 623 of the Age Discrimination in Employment Act (ADEA), prohibits the following:

> "It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment

> opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U.S.C. § 623.

The ADEA defines "employees" as "individuals employed by an employer," 29 U.S.C. § 630(f), and "employers]" as "persons] engaged in an industry affecting commerce who have twenty (20) or more employees .... " 29 U.S.C. § 630(b). Therefore, in order for corporation could be an "employer" under the ADEA the corporation's total workforce must exceed this 20-employee statutory threshold.

In the District Court, although Ottawa Medical Center conceded that, in fact, it was an employer within the meaning of the ADEA because it did employ at least 20 "employees", the Defendant, relying on a series of cases in which the principal issue before the court was whether or not the business had more than 20 employees, claimed that the plaintiff can not be both a shareholder and an "employee".

In particular the Defendant relied upon *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984), and *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) for the proposition that Dr. Schmidt's status as a shareholder in a professional medical corporation prevents him from being considered an employee entitled to bring suit under the ADEA.. In *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) the case involved a claim of gender discrimination by a partner of an small accounting firm charging that the other four partners had discriminated against her in the terms and conditions of her employment and in her discharge. The issue before the court was whether there was subject matter jurisdiction, i.e., whether the accounting partnership had fifteen or more employees. The

District Court's specific finding that was that partners cannot be included as employees for obtaining necessary subject jurisdiction under a statute authorizing an employment discrimination suit against an employer engaged in an industry affecting commerce that has 15 or more "employees". *Simpson v. Ernst & Young*, 100 F.3d 436 (6tn Cir. 1996), cert. denied, 117 S.Ct. 1862 (1997). Similarly, the case of *Smith v. Deitsch and Royer MD, Inc.*, 2000 U.S. Dist. LEXIS 16657 (Aug. 23, 2000) turned exclusively upon whether the only two shareholders and directors of the corporation should be included for the purpose of determining if the corporation had at least 15 employees.

The Defendant also relied upon *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984), for the proposition that Dr. Schmidt's status as a shareholder in a professional medical corporation prevents him from being considered an employee entitled to bring suit under the ADEA. *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984), involved a law firm organized as a professional corporation staffed by three attorney-shareholders and less than fifteen non-shareholders. The plaintiff brought suit under the Pregnancy Discrimination Act. The EEC argued that the three shareholder attorneys of Dowd & Dowd, Ltd. should be considered "employees," for the purpose of determining whether or not the law firm had fifteen or more employees and was and "employer" meeting the jurisdictional thresholds of the Pregnancy Discrimination Act. The Seventh Circuit rejected that argument holding shareholders were per se not "employees" for the purpose of determining subject matter jurisdiction.

The Plaintiff believes that the issue of determining who is an covered employee for purposes of the protection of the ADEA is best resolved by using the tests discussed by the United States Supreme Court in *Clackamas Gastroenterology*

Associates, P.C v. Wells. See also *Johnson v Cooper, Deans & Cargill*, 884 F.Supp. 43 (D.N.H.1994); *Hyland v. New Haven Radiology Associates*, 794 F.2d 793, 797 (2nd Cir. 1986); *Mooney vs. Bayfield Construction Co.*, 1995 WL 530656 (N.D., Ill.).. (These courts have noted the determination of whether an individual was an employee and therefore covered by the protections of the ADEA should not center on the label which the organization has chosen to give to the position but should look to the particular circumstances of the case at hand and focus not on any label, but only actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership or as an employee. See *Jones vs. Baskin, Flaherts, Elliot and Mannino, P.C.*, 670 F.Supp. 597 (W.D.Pa.1987) where the court found that the employee-directors remained employees for purposes of the Age Discrimination in Employment Act, where they were chosen for senior managerial staff positions, they continued their daily duties as senior officers or managers despite taking on additional oversight and policymaking responsibilities by virtue of their positions as directors, and their compensation was tied to their performance as evaluated by senior members of the board; and *Gorman v. North Pittsburgh Oral Surgery Associates, Ltd.*, 664 F.Supp. 212 (W.D.Pa.1987) Doctors who were shareholders in professional oral surgery corporation were "employees" under the Age Discrimination in Employment Act. See also *EEC vs. Johnson & Higgins*, 91 F.3d 1529 (6th Cir., 1996), *Hyland v. New Haven Radiology Associates*, 794 F.2d 793, 797 (2nd Cir. 1986); *EEC vs. Peat, Marwick Mitchell & Co.* 775 F.2d 928 (8th Cir., 1985); *EEC vs. First Catholic Slovak Ladies Association*, 694 F.2d 1068, 1070 (6th Cir., 1982); *Simpson vs. Ernst &Young*, 85 F.Supp 648 (S.D. Ohio, 1994); *Caruso vs. Peat, Marwick, Mitchell & Co.*, 779 F. Supp. 332, (S.D.N.Y. 1991)

Clackamas Gastroenterology Associates, P.C v. Wells instructs that "the answer to whether a shareholder-director is an employee or an employer cannot be decided in every case by a `shorthand formula or magic phrase' that each of the following six factors is relevant to the inquiry whether a shareholder-director is an employee:

Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work

Whether and, if so, to what extent the organization supervises the individual's work

Whether the individual reports to someone higher in the organization.

Whether and, if so, to what extent the individual is able to influence the organization.

Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.

Whether the individual shares in the profits, losses, and liabilities of the organization."

The facts of the case at bar are sufficiently contradictory so as to create a dispute of a fact requiring a jury's determination a whether or not the plaintiff is an "employee" under the ADEA. Although Dr. Schmidt was a shareholder of the corporation and he has been one of its managing shareholder physicians; that is not the sole capacity in which he was employed by the corporation. In addition to compensation plan adopted by corporate board of directors for shareholders, he was also compensated pursuant to an employment contract designed for the firm's physician-employees that dates back to 1976. The contract provides in pertinent part that Dr. Schmidt shall be employed as a physician and surgeon by the corporation, and shall devote all of his professional time, knowledge and skill to his

employment and shall perform such duties and occupy such positions and offices as the board of directors of the corporation may from time to time determine, including without limitation those duties and obligation set forth in the agreement as well as the treatment and diagnosis of those patients assigned to him by the corporation. The contract provided that all proceeds received by the employee for professional services, for whatever source derived, shall be the property of the corporation. Although Dr. Schmidt had been given complete control over the diagnosis and treatment of patients assigned to him, the corporation's board of directors retained the right to relieve him from the treatment of any patient the board of directors feels will be better treated by another employee of the corporation. The employment agreement also provided that the board of directors would have the sole authority to determine what employees of the corporation shall perform medical services for any particular patient. For compensation the contract provides that for all services rendered by the employee under the agreement the corporation would pay a basic salary of $3700.00 per month, plus such additional compensation in such forms and amounts as the corporation deems appropriate. That employment contract remained in effect, having never been terminated by Dr. Schmidt or Ottawa Medical Center and the corporation has provided additional compensation pursuant to compensation plans which have been adopted and revised from time to time by the corporation. Dr. Schmidt objected to the revised compensation plan and several of its prior revisions as being discriminatory of not only his personal rights, but the rights of other employees of the corporation based not only on age but on other employees' physical disabilities. He was paid, at the time of the Motion for Summary Judgment, solely his basic contracted salary of $3700.00 per month. Plaintiff believes that under such circumstances his capacity with the corporation is in reality that of an employee, with only such additional

limited personal discretion that the remaining shareholders of the corporation will allow him, and was entitled to bring suit under the ADEA.

CONCLUSION

WHEREFORE, Plaintiff, Richard A. Schmidt, M.D., by and through his attorney, Gary R. Garretson, respectfully prays that this Court reverse the District Court's order granting Defendant's motion for summary judgment and remand this cause for further proceedings before the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MARCH 5, 2003

SCHMIDT v. OTTAWA MED. CTR.,

322 F.3d 461 (7th Cir. 2003)

RICHARD A. SCHMIDT, M.D., Plaintiff-Appellant v. OTTAWA MEDICAL CENTER,

P.C., Defendant-Appellee.

No. 01-3274.

United States Court of Appeals, Seventh Circuit.

ARGUED OCTOBER 28, 2002.

DECIDED MARCH 5, 2003.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 00-C-7973-Elaine E. Bucklo, Judge. Gary R. Garretson, Morris, IL for Plaintiff-Appellant. Michael T. Reagan, Herbolsheimer, Lannon, Henson, Duncan & Reagan, Ottawa, IL for Defendant-Appellee. Before KANNE, DIANE P. WOOD, and EVANS, Circuit Judges.

KANNE, Circuit Judge. Does Dr. Richard A. Schmidt's status as a shareholder-director in a closely held professional corporation preclude him from being considered an "employee" entitled to bring suit under the Age Discrimination in Employment Act? Applying a functional "economic realities" test, which this Court adopted in EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984), and recently discussed in EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002), the district court interpreted the

relationship between Dr. Schmidt and Ottawa Medical Center as more like that of a partner to a partnership, rather than that of an employee to an employer. As such, the district court held that Dr. Schmidt could not entertain suit under the ADEA and granted summary judgment in favor of Ottawa Medical Center. Dr. Schmidt appeals, arguing that the economic realities dictate that he be treated as an employee under the Act. We affirm.

HISTORY

Ottawa Medical Center ("OMC") was originally incorporated under the Illinois Medical Practice Act, before it reorganized itself in 1969 as a professional corporation under the Illinois Professional Service Corporation Act. 805 ILCS 10/1 et seq. (2002). Dr. Schmidt, a family practice physician, began his practice with OMC in 1966 and, upon OMC's reorganization, became a founding shareholder. He has remained a shareholder at all relevant times since.

Including Dr. Schmidt, there are eight shareholder-physicians of OMC. Each has the right to an equal vote on shareholder-physician compensation plans, on proposed amendments to employment agreements, on the hiring of non-shareholder-physicians,[1] and any other matter put to shareholder vote. While being a shareholder-physician of OMC, Dr. Schmidt has also frequently served as one of its corporate officers, holding at different times vice-presidential and secretarial positions. Most recently in 1997, Dr. Schmidt was the corporation's secretary. During those periods that he was a corporate officer, Dr. Schmidt also had a seat on OMC's

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[1]Besides the eight shareholder-physicians, there were at the time of the complaint three nonshareholder-physicians and sixty-five nonphysician employees working at OMC. Their status under the Act is not at issue here.

board of directors. And in March 2000, the shareholders voted to amend OMC's bylaws to provide that all shareholders, by virtue of their shareholder status, would be directors of the corporation. Accordingly, Dr. Schmidt is once again a director of OMC. OMC compensates its shareholder-physicians in two ways. First, every shareholder-physician has executed employment agreements with OMC. Under his 1976 employment agreement, Dr. Schmidt draws a base salary of $3700 a month. Second, each shareholder-physician is also eligible to share in OMC's profits via shareholder compensation in addition to whatever base salary his or her employment contract provides. The formula for determining the amount of that additional compensation has been amended multiple times by the shareholder-physicians, and Dr. Schmidt has had the opportunity to vote on each of those proposals. Most recently in December 1999, the shareholder-physicians considered a plan whereby a shareholder-physician's compensation would equal his or her net medical receipts after deducting his or her pro rata share of overhead expenses, pension allocation, and profit-sharing contributions. Because Dr. Schmidt's net medical receipts would not have entitled him to any additional compensation under the proposed plan, he voted against it. He lost. Moreover, a majority of shareholder-physicians voted in 2000 to adopt new "Shareholder Employment Agreements" to supercede their outstanding employment agreements with OMC. Every shareholder-physician besides Dr. Schmidt has since entered into this new agreement. As a result of the new compensation structure, Dr. Schmidt has since drawn only the $3700-per-month base salary.

ANALYSIS

An appellate court reviews summary-judgment motions de novo, viewing the record and all inferences from it in the light most favorable to the non-moving party. *McCoy v. WGN*

Cont'l Broad. Co., 957 F.2d 368, 370 (7th Cir. 1992). Summary judgment is appropriate only when there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Id. Here, no material facts are in dispute; the parties contest only whether the facts require Dr. Schmidt to be treated as an "employee" of OMC for purposes of the ADEA.

The ADEA unhelpfully defines "employee" as "an individual employed by an employer," and an "employer" as "a person . . . who has twenty or more employees." 29 U.S.C. §§ 630(f), (b) (2002). To determine whether an organization has enough "employees" to qualify as an "employer" under the ADEA, we have already decided that the economic realities of the workplace, rather than mechanical adherence to state-law corporate forms, shall define the relationship between the parties. *EEOC v. Dowd & Dowd*, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984). In *Dowd*, we found that the "role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation." Id. We noted that "the economic reality of the professional corporation in Illinois is that the management, control, and ownership of the corporation is much like the management, control, and ownership of a partnership." Id. Since we did not consider bona fide partners as employees for purposes of Title VII actions, see *Burke v. Friedman*, 556 F.2d 867, 869 (7th Cir. 1977) ("[W]e do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business."), we saw no reason to treat professional corporation shareholders differently, and thus determined that those shareholders should be excluded from the ADEA employee count. Dowd, 736 F.2d at 1177.

We must now decide whether Dowd applies when we are asked to classify an individual shareholder-claimant as an

"employee" entitled to bring suit under the Act. If it does, and if "economic realities" control here as well, we must then ask, does Dowd require us always to treat Illinois professional-corporation shareholders as employers? If not, what factors will determine the actual role of the claimant-shareholder Page 464 in the operations of the involved entity? See *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991).

We recently asked similar questions in *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), where we held that the EEOC was entitled to continued enforcement of ADEA-coverage-related requests in a subpoena, when those requests could not be deemed unreasonable given continuing doubt over whether 32 demoted partners should be deemed bona fide partners (and thus employers) or de facto employees of a law firm in which ultimate decisionmaking authority rested solely with a few cyber-partners. In so ruling, we expressly refused to decide the question of the 32's status, noting that while they possessed many qualities indicative of bona fide partners in a partnership under Illinois law (that is, their income included a share of firm profits, they made capital contributions to the firm, they were liable for firm debts, and they had some administrative or managerial responsibilities), their individual fates at the firm were controlled entirely by a self-perpetuating executive management committee, which on a whim could fire, promote, demote, or raise and lower the pay of the 32. Id. at 699, 703.

Although we reserved the question of the 32's status, had we been prepared to accept a mechanical test-that the use of the partnership form as recognized under Illinois state law precluded finding the 32 as anything but partners and, thus, employers under the Act-there would have been no need to continue the EEOC's investigation into the circumstances of the 32's actual role in the firm. Id. at 707 (listing additional information sought by the EEOC that "would bear on the

unavoidably multifactored determination" of whether the 32 should be treated as employers or employees). Our holding in Sidley, therefore, must be read to apply Dowd's functional test of employee status to determinations of whether an individual claimant qualifies as an employee under the ADEA. [2]

What remains is deciding which factors, in what we anticipated would be a multifactored analysis, see id. at 18, shall be important to determine whether Dr. Schmidt should be treated as an employer or an employee. Dowd provides little guidance-there, we matter-of-fatly observed that "the economic reality of the professional corporation in Illinois is that the management, control, and ownership of the corporation is much like the management, control, and ownership of a partnership." Dowd, 736 F.2d at 1178. While that may be true, as we observed in *Sidley*, all partnerships are not created equal, and, because of this, all partners may not always be employers for purposes of the federal-discrimination statutes. *Sidley*, 313 F.3d at 702; see also Burke, 556 F.2d at 869 (finding only bona fide partners exempt from the federal-discrimination statutes). We will not, therefore, interpret Dowd to require us always to treat shareholders in Illinois professional corporations as employers; such a result would stand Dowd on its head, favoring, in the end, labels over realities.

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[2]We are not the first circuit to follow *Dowd* to this conclusion. See *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1400- 01 (11th Cir.1991) (holding that a plaintiff shareholder in a professional corporation of accountants was akin to a partner, precluding his status as an "employee"); cf. *Devine v. Stone Leyton & Gershman, P.C.*, 100 F.3d 78, 80-81 (8th Cir.1996) (following *Dowd* to determine employee count).

If not to Dowd, then where are we to look? An exhaustive discussion of the relevant case law in Sidley revealed alternate Page 465 lines of precedent suggesting this multi-factored analysis could be conducted either with an eye towards statutory purpose, see *Sidley*, 313 F.3d at 702 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (looking to "consistency with a primary purpose of anti-retaliation provisions" in deciding whether former employees were "employees" under Title VI)), or under the general common law of agency, see id. at 705 (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-25 (1992) (resolving the circularity of ERISA's definition of "employee" by incorporating into federal law commonlaw agency criteria for identifying master-servant relations)). But we could not fairly decide which approach should govern on the facts of the case then before us: our task was only to decide whether continued enforcement of the coverage-related requests in the EEOC's subpoena was justified. The observation that the law regarding coverage was unsettled led us to conclude that the EEOC was entitled to investigate the issue further. Id. at 707.

The Supreme Court may ultimately resolve this tension between statutory purpose and agency principles since it has granted certiorari in *Wells v. Clackamas Gastroenterology Assoc.*, in which the Ninth Circuit rejected Dowd's economic-realities test in holding that the conscious adoption of the corporate form dictated that shareholder-physicians in closely held professional corporations be treated as employees. 271 F.3d 903, 905 (9th Cir. 2001), cert. granted 123 S.Ct. 31 (2002). Citing the "broad purpose" of the federal employment-discrimination statutes, the Ninth Circuit refused to allow the shareholders to reap the tax, employment benefits, and civil-liability advantages of the corporate form, while avoiding federal employment-discrimination liability by asserting that they were really partners in a partnership. Id. (citing *Hyland v.*

New Haven Radiology Assocs., 794 F.3d 793, 796 (2d Cir. 1986) (rejecting *Dowd*)). But the Ninth Circuit admitted it would not in all instances adhere mechanically to state-law forms: echoing Justice Powell's concurrence in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), it would not allow a firm to avoid liability for discrimination by labeling the bulk of its employees "partners". *Clackamas*, 271 F.3d at 905; see also Hishon, 467 U.S. at 79 n. 2 (Powell, J., concurring) ("[A]n employer may not evade the strictures of Title VII simply by labeling its employees as `partners.'"). The Ninth Circuit did not discuss what approach it would take to separate true partners from fake ones, nor did it discuss the presumption announced in Darden that traditional agency principles define who is an employee unless Congress speaks otherwise. Sidley, 313 F.3d at 711 (Easterbrook, J., concurring).[3]

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[3]The question in Darden was whether the claimant should be classified as an employee or an independent contractor for ERISA purposes. And like they had done elsewhere when "Congress has used the term 'employee' without defining it," see, e.g., Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (Copyright Act of 1976, 17 U.S.C. § 101); Kelley v. S. Pac. Co., 419 U.S. 318, 322-23, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974) (Federal Employers Liability Act, 45 U.S.C. §§ 51-60); Baker v. Tx. & Pac. Ry. Co., 359 U.S. 227, 228, 79 S.Ct. 664, 3 L.Ed.2d 756 (1959) (same), the Justices "concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." Darden, 503 U.S. at 322-23, 112 S.Ct. 1344. The Court rejected the lower court's argument that the term should be defined in light of the purposes of the Act. Id. at 324, 112 S.Ct. 1344. Although the Court had previously taken this approach in defining

In any event, we need not attempt to resolve this tension here. It makes little difference in this case whether we are guided in our analysis of the economic realities by adherence to common-law agency principles or by attention to statutory purpose. Under either approach, we must conclude that Dr. Schmidt's shareholder-physician role was akin to that of a bona fide partner-employer rather than that of an employee.

It is beyond reproach that both agency-law principles and statutory purpose would consider control over employment opportunities to be a relevant factor. Certainly, in describing the master-servant relationship, agency law focuses on control: The defining characteristic of the master-servant relationship is the possession in the one of the right to control the work of the other. That is, "the relation presupposes the right of the

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"employee" for purposes of the National Labor Relations Act, see NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120-29, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), and the Social Security Act, United States v. Silk, 331 U.S. 704, 713, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947) (construing the term "in the light of the mischief to be corrected and the end to be attained"), the Court noted that after each decision was announced, Congress had amended the statute at issue to clarify that it had meant for traditional common-law agency principles to govern the term's definition. Darden, 503 U.S. at 324, 112 S.Ct. 1344. That circumstance brought about the conclusion in Darden that the agency-law presumption announced in Reid in the wake of Congress's action in response to Hearst and Silk had "signaled [the Court's] abandonment" of the purposes-focused analysis of the earlier cases. Id. at 325, 112 S.Ct. 1344.

master to have the work executed in such manner as he directs and a correlative duty on the part of the servant to perform as expressly or impliedly directed by the master." HAROLD GILL REUSCHLEIN ET AL., THE LAW OF AGENCY AND PARTNERSHIP at 102 (2d ed. 1990). Conversely, "[t]he essence of [a] partnership is the common conduct of a shared enterprise," and as a result the recognition that decisions important to that enterprise are made by common agreement. Hishon, 467 U.S. at 79-80 (Powell, J., concurring). Which is to say, the sharing of the control of the enterprise, and by extension each other's fate in it, is the sine qua non of partnership. REV. UNIF. PARTNERSHIP ACT §§ 202(a), cmt. (1997) ("[T]he attribute of co-ownership distinguishes a partnership from a mere agency relationship. . . . Ownership involves the power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control." (citing UNIF. PARTNERSHIP ACT §§ 6(1) cmt.)).

As for statutory purpose, the Supreme Court has opined that the congressional intent behind the federal anti-discrimination laws was to prohibit those entities where "control over access to the job market may reside" from "exerting any power [they] may have to foreclose, on invidious grounds, access by an individual to employment opportunities otherwise available to him." *Ex rel. Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 422-23 (7th Cir. 1986) (discussing *Sibley Mem. Hosp. v. Wilson*, 488 F.2d 1338, 1340-1341 (D.C. Cir. 1973)). Perhaps it was this recognition of statutory purpose that led Justice Powell to conclude in *Hishon* that bona fide partners cannot be considered "employees" for purposes of Title VII because a relationship among the partners that " `contemplates that decisions will be made by common agreement or consent . . . ,' has a governance structure different from one

contemplated or assumed by Title VII." *Sidley*, slip op. at 17 (emphasis added) (quoting Hishon, 467 U.S. at 79-80 (Powell, J., concurring)).

Here, Dr. Schmidt throughout his career has shared in the management and control of OMC. He was a founding shareholder-physician of the corporation and has remained one at all relevant times since. During most of the last decade he was also a corporate officer and held a seat on OMC's board, and he once again holds a director's seat now by virtue of his enduring status as a shareholder. As a shareholder, he possesses an equal vote in all matters put to shareholder vote, including the hiring of non-shareholder-physicians and shareholder compensation. Presumably as a director, he has in the past and now also enjoys a voice in all matters put before the board. Throughout his relationship with OMC and continuing to the present day, Dr. Schmidt thus has had ample opportunity to share in the management and control of OMC.

And the mere fact that lately his preferences on shareholder-compensation proposals have not secured the majority opinion of his fellow shareholders does not alter the fact that with each vote he has exercised this right to control. Even though Dr. Schmidt rejected the current plan because he would be affected adversely by its passage, he nevertheless had the opportunity to participate in revising and voting on it. It is hornbook law that majority rules dictate the governance of partnerships (in the absence of an act in contravention of the partnership agreement or extraordinary matters), and thus partnership law anticipates that individual partners may be bound by adverse majority decisions of the partnership as a whole. REUSCHLEIN ET AL., supra, at 276. It is common for partners to vote on compensation that reflects each partner's economic contributions to the firm. See *Hishon*, 467 U.S. at 79

n. 3 (Powell, J., concurring) ("Divisions of partnership profits, unlike [common] shareholders' rights to dividends, involve judgments as to each partner's contribution to the reputation and success of the firm."). That appears to be what has happened in this case.

Against this conclusion, Dr. Schmidt argues that his employment agreement, which repeatedly refers to him as an employee, signifies a relinquishment of control over his employment since, among other things, it vests sole authority of patient assignment in OMC's board. But Dr. Schmidt is also a member of the board, which confers upon him decisionmaking authority with respect to these matters, including patient assignments. Moreover, his employment agreement vests in him absolute authority for the treatment of his patients once assigned to him. Therefore, while Dr. Schmidt may not possess sole authority over the conditions of his employment (that is, he only shares that complete authority in equal parts with other members of the board), he does exercise significant control. And since each of the seven other shareholder-physicians are governed by similar employment agreements, Dr. Schmidt exercises as much control over his employment as any other member of OMC. By contrast, the non-shareholder-physicians have no ability to exercise any control over patient assignments or any other matter put to the directors or shareholders.

CONCLUSION

We need not determine here whether the absence of control in and of itself will distinguish bona fide partner-employers from disguised employees when the presence of other factors may favor partnership. *Compare Sidley*, 313 F.3d at 702-03 (discussing the absence of control as a factor weighing in favor of classifying the 32 demoted partners as employees), with id. at 709-10 (Easterbrook, J., concurring)

Page 468 (relying on the presence of profit-sharing and the spectre of unlimited liability as characteristics in favor of treating the 32 as bona fide partner-employers), and REUSCHLEIN ET AL., supra, at 250 ("Many decisions permit management to be centralized in one partner, or a small committee of partners. Where this is done, co-ownership is still found to exist frequently but only if the other factors are consistent with partnership."). We only hold that when an individual claimant-shareholder enjoys the opportunity for shared control of the closely held professional corporation, including the opportunity to share in its profits, we will treat him or her as a bona fide employer for purposes of the ADEA. The decision of district court is therefore AFFIRMED. [fn1] Besides the eight shareholder-physicians, there were at the time of the complaint three non-shareholder-physicians and sixty-five non-physician employees working at OMC. Their status under the Act is not at issue here. [fn2] We are not the first circuit to follow *Dowd* to this conclusion. See *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991) (holding that a plaintiff shareholder in a professional corporation of accountants was akin to a partner, precluding his status as an "employee"); cf. *Devine v. Stone Leyton & Gershman*, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996) (following Dowd to determine employee count). [fn3] The question in Darden was whether the claimant should be classified as an employee or an independent contractor for ERISA purposes. And like they had done elsewhere when "Congress has used the term `employee' without defining it," see, e.g., Cmty. for Creative Non-violence v. Reid, 490 U.S. 730, 739 (1989) (Copyright Act of 1976, 17 U.S.C. §§ 101); *Kelly v. S. Pac. Co.*, 419 U.S. 318, 322-23 (1974) (*Federal Employers Liability Act*, 45 U.S.C. §§ 51-60); *Baker v. Tx. & Pac. R.R. Co.*, 359 U.S. 227, 228 (1959) (same), the Justices "concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."

Darden, 503 U.S. at 322-23. The Court rejected the lower court's argument that the term should be defined in light of the purposes of the Act. Id. at 324. Although the Court had previously taken this approach in defining "employee" for purposes of the National Labor Relations Act, see *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-29 (1944), and the Social Security Act, *United States v. Silk*, 331 U.S. 704, 713 (1947) (construing the term "in the light of the mischief to be corrected and the end to be attained"), the Court noted that after each decision was announced, Congress had amended the statute at issue to clarify that it had meant for traditional common-law agency principles to govern the term's definition. *Darden*, 503 U.S. at 324. That circumstance brought about the conclusion in Darden that the agency-law presumption announced in Reid in the wake of Congress's action in response to *Hearst* and *Silk* had "signaled [the Court's] abandonment" of the purposes-focused analysis of the earlier cases. Id. at 325.

APPENDIX B – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED AND DECIDED AUGUST 3, 2001.

SCHMIDT v. OTTAWA MEDICAL CENTER, P.C., (N.D.Ill. 2001)

DR. RICHARD A. SCHMIDT, M.D., Plaintiff, v. OTTAWA MEDICAL CENTER, P.C.,

a corporation, Defendant.

No. 00 C 7973

United States District Court, N.D. Illinois, Eastern Division

August 3, 2001

MEMORANDUM OPINION AND ORDER

ELAINE E. BUCKLO, District Judge

Dr. Richard A. Schmidt, M.D., alleges that Ottawa Medical Center ("OMC") violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, because he was compensated less than younger and less experienced physicians, he was expected to adhere to an on-call schedule that was difficult for him to meet because of his age, and OMC refused to fully fund profit sharing and retirement programs that benefitted him. OMC moves for summary judgment, claiming that Dr. Schmidt, as a shareholder of a professional corporation, is not an employee entitled to protection under the ADEA. I grant the motion.

I.

Dr. Schmidt has maintained a family practice with OMC since 1966. From 1966 to 1967, he was merely an

employee of OMC. He became an partner in 1967, and has been a shareholder since 1969, the year of incorporation. OMC currently employs a total of 77 people, including eight physicians who are shareholders, three physicians who are not shareholders; one nurse practitioner who is not a shareholder, and 65 other employees, none of whom is a shareholder.

Throughout the years, Dr. Schmidt has served as an officer of OMC. He served as Vice President from 1988 to 1991, and as Secretary from 1994 to 1997. On March 13, 2000, OMC amended its bylaws and made all shareholders directors of the corporation, so Dr. Schmidt is currently a director.

On December 1, 1976, Dr. Schmidt entered into an employment agreement with OMC. It states that Dr. Schmidt is:

> employed as a physician and surgeon by the Corporation, and shall devote all of his professional time, knowledge, and skill to his employment and shall perform such duties and occupy such positions and offices as the Board of Directors of the Corporation may from time to time determine, including . . . the treatment and diagnosis of those patients assigned to him by the Corporation.

For compensation, the employment agreement states that Dr. Schmidt shall receive a basic salary of $3700 per month, and in addition, "shall be eligible to receive additional compensation in forms and amounts as the Corporation deems appropriate." The corporation retains "all proceeds received by the Employee for professional services, from whatever source derived." Dr. Schmidt is currently being paid solely his base salary of $3700 per month, or $44,400 per year.

All physician shareholders of OMC are compensated pursuant to the Shareholder Compensation Plan ("the Plan"). All eight shareholders have the opportunity to participate in the

revision process and vote on the Plan. The new plan was adopted by a vote of a majority of the shareholders. The Plan, which was adopted on December 13, 1999, calculates the shareholder's salary by taking the professional fees generated by a physician, and deducting the corporation's overhead, as well as certain benefits. OMC claims that Dr. Schmidt's generation of professional fees does not qualify him for any additional compensation under the Plan, other than his base salary. Dr. Schmidt does not dispute this, so I must accept it as true.

II.

Summary judgment should only be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding the motion for summary judgment, I must construe all facts in a light most favorable to the non-moving party as well as view all reasonable inferences in the party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The only issue in this case is whether Dr. Schmidt's status as a shareholder in a professional corporation prohibits him from claiming status as an "employee" within the meaning of the ADEA. OMC argues that because Dr. Schmidt is a shareholder, he is not protected under the ADEA. The definitions in the ADEA are unhelpful, defining "employee" as "an individual employed by an employer," 29 U.S.C. §§ 630(f), and "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees. . . ." 29 U.S.C. §§ 630(b). The Seventh Circuit has held that true partners in an accounting firm cannot be regarded as employees under 42 U.S.C. §§ 2000(e)(f), because of their unique status as business owners and managers, and their share in the losses and profits. *Burke v. Friedman*, 556 F.2d 867, 869 (7th Cir. 1977) (Title VII). The Seventh Circuit extended this reasoning in *E.E.O.C.*

v. Dowd & Dowd, 736 F.2d 1177 (7th Cir. 1984), in which it held that shareholders in a professional corporation engaged in the practice of law are not "employees" for purposes of determining whether the corporation was an "employer" under Title VII. *Id.* at 1178. The court applied an "economic reality" test of the employment relationship, and viewed the role of "a shareholder in a professional corporation to be far more analogous to a partner in a partnership than it is to the shareholder of a general corporation." *Id.* at 1177-78. The court reasoned that "[t]he economic reality of the professional corporation in Illinois is that the management, control, and ownership of the corporation is much like the management, control, and ownership of a partnership," so there is "no reason to treat the shareholders of a professional corporation differently for purposes of Title VII actions than we did partners of the accounting firm in *Burke*." *Id.* at 1177.

Dr. Schmidt argues that I should not rely on *Dowd & Dowd*, and refers to *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2d Cir. 1986), in which the Second Circuit rejected *Dowd & Dowd*, and held that shareholders of a professional corporation were employees of the corporation for purposes of the ADEA. *Id.* at 798. Unfortunately for Dr. Schmidt, "[t]his court simply is not free to choose sides in the debate between the Seventh and Second Circuits on this issue." *Smith v. Deitsch and Royer MD, Inc.*, No. 1P99-1123-C-H/G, 2000 WL 1707964, at *2 (N.D. Ill. Aug. 23, 2000) (granting summary judgment on the basis that two physician shareholders in a professional corporation were not to be counted as employees" for purposes of determining whether the corporation was an employer under the ADEA). The Seventh Circuit precedent controls in this jurisdiction, so unless this case is distinguishable from *Dowd & Dowd*, I must follow it. The issue in Dowd & Dowd was the number of employees for jurisdictional purposes, but the same test should

be used to determine who is an employee regardless of whether the inquiry is coverage or the right to sue because the ADEA only contains one definition of "employee," and Dr. Schmidt gives no reason why a different test should be used. *Wells v. Clackamas Gastroenterology Assocs., P.C.*, No. CV 99-406-AS, 2000 WL 776416, at *2 (N.D. Ill. May 5, 2000).

In *Dowd & Dowd*, the Seventh Circuit did not adopt a *per se* rule, but applied the "economic realities" standard, stating that "a person's status as an employer rather than employee must be informed by strong consideration of the economic realities of the employment relationship." 736 F.2d at 1178. I must assess "the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate." *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983). In *Armbruster*, the Sixth Circuit provided a non-exhaustive list of factors to consider, including: "hiring and termination processes and history of the manufacturer's representatives as well as evidence as to payment of these individuals, company-paid benefits or advances." 711 F.2d at 1342. This is a factual inquiry. *See id.* The amount of control an employer exercises over the employee's manner and means of work is not determinative, but it is relevant to the "interrelationship" between an employer and an employee. *Ikpoh v. Central Dupage Hosp.*, No. 90 C 7146, 1993 WL 524817, at *19 (N.D. Ill. Dec. 15, 1993).

Dr. Schmidt argues that he is an employee because he has an employment contract with OMC, which repeatedly refers to him as an "employee of the Corporation." However, every physician shareholder of OMC has an employment contract, and each also works for OMC. By definition, only professionals within the relevant profession can be shareholders in a professional corporation. *Dowd & Dowd*, 736

F.2d at 1179. Therefore, each shareholder serves in his or her capacity as an employee physician along with his or her responsibilities as a shareholder of the corporation.

Although Dr. Schmidt has been a shareholder of OMC for more than 30 years and has served as an officer on the Board of Directors, he argues that his capacity with OMC is in reality that of an employee, because he lacks the requisite control over his employment and has only limited personal discretion that the remaining shareholders of the corporation allow him. Dr. Schmidt's employment contract allows the Corporation to determine what positions and offices he will hold, and what patients are assigned to him. Also, OMC's Board of Directors retains the right to relieve him from the treatment of any patient whom it feels will be better treated by another employee of OMC. Even though Dr. Schmidt may not exercise total control over his employment, he does exercise some control. He served as an officer on the Board of Directors for many years. He is given a voice and a vote in all shareholder meetings. Dr. Schmidt claims that from March 1997 through March 13, 2000, the primary control for the operation of OMC was through a Board of Directors of which he was not a member. However, the fact that one or more shareholders or partners might have more influence than others does not support a finding that the others are employees. *See Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398 at 1401 (11th Cir. 1991).

Finally, Dr. Schmidt argues that he is an employee because he does not share in the profits of OMC. Currently, he is paid only his base salary of $3700 a month, but is eligible for other compensation, as provided by the plan. Dr. Schmidt rejected the current plan, but he nevertheless had the opportunity to participate in the process of revising and voting on the Plan. The non-shareholder physician employees did not have this same opportunity. Further, Dr. Schmidt does not

dispute that he does not qualify for any additional compensation because of his lack of generation of professional fees. Dr. Schmidt has the *opportunity* to share in the profits of OMC, a privilege which is limited to shareholders.

Under Seventh Circuit law, the economic reality in this case is that, in his capacity as shareholder, Dr. Schmidt is like a partner in a partnership. Therefore, Dr. Schmidt cannot be viewed as an "employee" under the ADEA. *Dowd & Dowd*, 736 F.2d at 1177-78. Accordingly, I GRANT Ottawa Medical Center's motion for summary judgment.